

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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3 LEVI BUSSANICH, LEVI BUSSANICH AND
4 SHARLYN BUSSANICH, HAWENT LLC, THE
5 BRUMBACH FAMILY LTD. PARTNERSHIP,
6 HOWARD AND NANCY POLEN, JUDITH AND
7 THOMAS BUSH AND RUBY L. BRUMBACK,

8 Petitioners,

9 v.

10 CITY OF OLYMPIA,

11
12 Respondent.
13
14

Case No. 09-2-0001

ORDER ON MOTION TO VACATE

15 This matter comes before the Board on Petitioners' Motion to Vacate Order of Board.¹ This
16 motion seeks vacation of the Board's April 1, 2009 Order on Dispositive Motion (the "Order")
17 which dismissed this appeal. The City of Olympia filed an Answer/Response to Motion to
18 Vacate on April 10, 2009. On April 15, 2009, Petitioners filed a Reply to City's Response to
19 Motion to Vacate. And, on April 16, 2009, the City filed an Objection to Petitioners' Reply.
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21 As a preliminary matter the Board concurs with the City² that the Board's rules do not
22 provide for the moving party to reply to a response brief. The moving party files their
23 opening brief, to which the non-moving party is entitled to respond.³ Historically, no further
24 replies are expected or permitted by the Board. Therefore, the Petitioners' reply to the
25 City's Answer/Response to the Motion to Vacate will not be allowed.
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28 Next, although Petitioners' motion is titled a "Motion to Vacate Order of Board," the motion
29 states that "Plaintiffs (*sic*) move the Board to reconsider on several grounds."⁴ Therefore,
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31 ¹ Petitioners' Motion to Vacate Order of Board, filed April 6, 2009.

32 ² City's Objection to Petitioners' Reply, at 1-2.

³ WAC 242-02-530 (Filing of motions); WAC 242-02-534 (Response to motions).

⁴ Petitioners' Motion to Vacate Order of the Board, at 1 (Emphasis Added).

1 although the City argues there is no legal authority for a motion to vacate,⁵ the Board will
2 treat Petitioners' motion as a Motion to Reconsider the Board's Order on Dispositive Motion.

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4 Petitioners seek reconsideration on three grounds:⁶

5 (1) The City of Olympia's (the "City") Dispositive Motion was filed and served
6 well after the last date to serve dispositive motions under the Pre-Hearing
7 Order and therefore the motion was not properly before the Board;

8 (2) Even if the motion were allowed, the Petitioners' time to respond had not
9 elapsed, as the motion was not received until March 25, 2009; and

10 (3) Petitioners appealed issues within the jurisdiction of the Board, the Board
11 should not have dismissed those claims.

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13 Allegation of Untimely Filing and Service

14 Petitioners allege the City filed its Dispositive Motion after the date provided for in the
15 Prehearing Order. Petitioners are mistaken. The Prehearing Order established March 18,
16 2009, as the filing date for dispositive motions.⁷ The City's Dispositive Motion was filed with
17 the Board on that date, and was date stamped March 18, 2009.⁸ The City clearly complied
18 with the Board's Prehearing Order and timely filed its motion.

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21 Petitioners also allege that the City served its motion on them in an untimely manner. First,
22 Petitioners assert the City failed to file a certificate of service as required by WAC 242-02-
23 340 and, therefore, the City's motion should be stricken on this basis. In addition,
24 Petitioners further this argument by contending the Board improperly dismissed the Petition
25 for Review when there was no evidence before the Board indicating Petitioners had been
26 timely served with the motion by the March 18, 2009 deadline.⁹
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31 ⁵ City's Answer/Response at 3.

32 ⁶ Petitioner's Motion to Vacate, at 1-2.

⁷ March 5, 2009 Pre-Hearing Order at 2.

⁸ See, Exhibit 1, attached to the City's Answer/Response to Motion to Vacate. The Board further notes the
City filed its motion with the Board physically and by e-mail.

⁹ Motion to Vacate at 3.

1 The City included a certificate of service with its Dispositive Motion; it appears on page 5 of
2 the motion. But, it states that on March 18, 2009 the City's "Notice of Appearance" was sent
3 to Petitioners' attorney by e-mail transmission and U.S. Mail.¹⁰ The City argues that the
4 description of the document served on the Petitioners was a scrivener's error and an
5 "unchanged legacy from a prior document."¹¹
6

7 As the City correctly notes, our State Supreme Court has held that an error in a proof of
8 service does not invalidate the service of the document itself.¹² Further, the Court noted
9 that the Board's rules allow, but do not require, a certificate of service as proof of service is
10 satisfied either by acknowledgement of service or by certificate attesting to personal service
11 or service by mail.¹³
12

13 Here, proof of service of the City's motion is provided by: a) the certificate of service
14 contained in the City's Dispositive Motion (albeit with a reference to the "Notice of
15 Appearance"); and b) the acknowledgement of service contained within the Declaration of
16 Jane Koler, attached to the present Motion to Vacate, in which the attorney for Petitioners
17 acknowledges receipt of the City's Dispositive Motion.¹⁴ In addition, WAC 242-02-340 does
18 not create an absolute requirement for a certificate of service, but instead provides for proof
19 of service "[W]here proof of service is required by this chapter, by statute, or upon a board's
20 request". Petitioners point to no other provision mandating proof of service for a motion in
21 this circumstance and, therefore, the City's alleged failure to provide a clear and
22 unambiguous certificate of service was not "a fatal flaw" as Petitioners assert.¹⁵
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26 While the Board concludes the City did, in fact, serve Petitioners with its Dispositive Motion,
27 this is not to say that it was served in a timely manner. Petitioners point out that the
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30 ¹⁰ City of Olympia's Dispositive Motion at 5. The City does not allege, and the Board does not find, that service
31 of a motion on the opposing party may be accomplished via e-mail.

32 ¹¹ City's Answer/Response at 7.

¹² Diehl v. Western Washington Growth Management Hearings Board, 153 Wn.2d 207, 218 (2004).

¹³ Diehl at 214.

¹⁴ Declaration of Jane Koler at 1.

¹⁵ Motion to Vacate at 3.

1 postmark on the envelope containing the City's Dispositive Motion was dated March 20,
2 2009.¹⁶ They offer this as evidence of a failure to serve a motion on the same day that it is
3 filed with the Board, as required by WAC 242-02-310. In response, the City argues it placed
4 the motion in the City's internal mailbox on March 18 and "[I]t is common to place a letter in
5 the mail system and have it be postmarked a day or two later."¹⁷
6

7 In fact, WAC 242-02-310(1) provides:

8 "Parties filing pleadings, briefs, exhibits and other documents or papers with a
9 board shall also serve copies upon all other parties **no later than the date**
10 **upon which they were filed with the board.** Parties served shall be those
11 included on the declaration of service list attached to the board's prehearing
12 order, or amended prehearing order." (Emphasis added)

13 While WAC 242-02-330, "Service of Papers – When Complete", is silent on the issue of
14 when service on a party is deemed complete, placing them in the United States Mail on the
15 day of filing with the Board is appropriate; relying on the City's internal mail system is not.
16

17 The GMA explicitly states the Administrative Procedures Act (APA), RCW 34.05, governs
18 the practices and procedures of the Board.¹⁸
19

20 Turning to the APA for guidance, RCW 34.05.010(19) provides a definition of service:
21

22 "Service," except as otherwise provided in this chapter, means posting in the
23 United States mail, properly addressed, postage prepaid, or personal service.
24 **Service by mail is complete upon deposit in the United States mail.**
25 Agencies may, by rule, authorize service by electronic telefacsimile
26 transmission, where copies are mailed simultaneously, or by commercial
27 parcel delivery company. (Emphasis added)

28 In this case, the Board concludes that the City mailed its dispositive motion to the
29 Petitioners on March 20, 2009, the date its dispositive motion was placed in the United
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32 ¹⁶ Motion to Vacate at 2; Declaration of Jane Koler at 2, and Exhibit 1.

¹⁷ City's Answer/Response to Motion at 2-3; Declaration of Linda McCray.

¹⁸ RCW 36.70A.270(7).

1 States mail, as shown by the postmark. The Board will discuss, below, the consequences
2 of this late mailing which resulted in Petitioners receiving the City's motion on March 25.

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4 **Conclusion:** The Board finds and concludes the City timely filed its Dispositive Motion by
5 the deadline of March 18, 2009 as required in the Board's Prehearing Order. The Board
6 also finds the scrivener's error in the Certificate of Service did not invalidate the City's
7 Motion. Finally, the Board finds and concludes the City failed to serve the Petitioner with
8 the motion as required by WAC 242-02-310(1). However, despite this failure and for
9 reasons noted *infra*, the Board DENIES Petitioners' request to find the motion was not
10 properly before the Board.
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13 Allegation that Petitioners' Time to Respond Had Not Elapsed

14 Petitioners argue that, although the time to respond to a dispositive motion was set at March
15 30, 2009 in the Prehearing Order, because they received the City's motion on March 25
16 their time to respond to the motion was to be extended to April 4, 2009. This is based on
17 counting the days between the due dates established in the Prehearing Order for dispositive
18 motions (March 18) and the deadline for responses (March 30), with Petitioners arriving at
19 13 days.¹⁹
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22 The Board notes the Prehearing Order makes no mention of granting 13 days to respond to
23 a motion. It sets out specific dates for the filing of motions and briefs. As the City notes,
24 the Prehearing Order unambiguously specified a date for responses to dispositive
25 motions.²⁰ While WAC 242-02-534 states the general rule that "a party served with a
26 motion shall have ten days from the date of the receipt of the motion to respond to it," the
27 rule continues "*unless otherwise directed by the presiding officer.*" Here the Prehearing
28 Order set the date for a response at March 30, 2009. With that date established, it was
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31 ¹⁹ The Board does not understand Petitioners' method for counting days. Assuming that it would be
32 appropriate to use a calculation of 13 days from March 25, the 13th day would fall on April 7. However,
calculating 13 days to respond to the City's motion counts both the day the motion was filed, and the day of
response, contrary to the common method of calculation provided in WAC 242-02-060 and Court Rule 6.

²⁰ City's Answer/Response to Motion at 5.

1 incumbent upon Petitioners to file its response by that date. In this matter, Petitioners filed
2 nothing with the Board by March 30.

3
4 Petitioners fail to explain why, upon receipt of the City's motion on March 25, they did not:
5 (1) respond by the March 30 date provided in the Prehearing Order or (2) request an
6 extension of time to account for the City's delay in serving its motion. Any of these
7 responses could have been considered by the Board,²¹ yet Petitioners took none of these
8 steps.

9
10 **Conclusion:** The March 5, 2009 Prehearing Order established a deadline of March 30,
11 2009 for the filing of responses to any substantive motions filed in this matter. Despite
12 having received the City's Dispositive Motion on March 25, the Petitioners did not file a
13 response with the Board nor did the Petitioners, because of extenuating circumstances,
14 seek an extension of the response time with the Board. Therefore, Petitioners' request for
15 the Board to vacate the Order in this regard is DENIED.
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18 Petitioners' Response to the City Motion

19 As noted above, Petitioner's Motion will be allowed as a motion to reconsider the Board's
20 Order on Dispositive Motion.
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22 Petitioners state, as to Issues 1, 2, 4 and 5²² that "[T]hese four issues all raise the issue of
23 whether the City's enactment of the comprehensive plan violated the Growth Management
24 Planning Goals, including RCW 36.70A.020(6) which specifies that private property shall not
25 be taken for a public use without compensation being made."²³ Petitioners mischaracterize
26 the issues. Perhaps Petitioners are mistakenly referring to the allegations originally stated
27 in their Petition for Review. The issues in this case are those set forth in the Prehearing
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32 ²¹ The Board is not stating that it would have granted any such request for extension, only that the merits of
any such a request would have been considered.

²² Petitioners make no argument as to Issue 3.

²³ Motion to Vacate at 4.

1 Order following a discussion between the Petitioners and the City at the Prehearing
2 Conference.²⁴ As stated in that order:

3 Petitioners have the obligation to review these issue statements to ensure that it
4 properly sets forth the issues they have raised. If the Petitioners object to the
5 completeness or accuracy of these issue statements, they must file a written
6 motion for change together with the proposed changed issue or issues in its
7 entirety no later than seven (7) days after the date of this order.²⁵

8 Petitioners raised no such objection; therefore the issues in this appeal are as set out in that
9 order. Of those issues, only Issue 1 specifically raises an allegation of a violation of the
10 GMA. The remaining Issues, Issues 2, 3, 4, and-5, raise issues of whether the City has
11 violated the US Constitution, the Washington State Constitution, or RCW 82.02.020.²⁶ As
12 explained in the Board's Order on Dispositive Motion, the Board has no jurisdiction to
13 consider such issues.²⁷

14
15 With regard to Issue 1, Petitioners offer no evidence to demonstrate that this is a matter
16 over which the Board has jurisdiction. As the Board held in the Order on Dispositive Motion,
17 the ordinance under appeal makes no provision for a requirement for a dedication of
18 property for an extension of Ensign Road, and merely amends the Olympia Comprehensive
19 Plan Transportation Map to adopt the "Transportation 2025 Map".²⁸ There is no
20 requirement for a dedication of right of way for a road extension.
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22
23 Although Petitioners argue that in reviewing a dispositive motion the Board is required to
24 view all evidence in the light most favorable to the Petitioners,²⁹ they have not submitted
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28 ²⁴ RCW 36.70A.290(1).

29 ²⁵ March 5, 2009 Prehearing order at 3.

30 ²⁶ Specifically, the Pre-Hearing Order states these issues, in relevant part, as follows: (Emphasis added)
31 Issue 2: Did the City of Olympia ... impose an unconstitutional exaction ... *in violation of the Washington State*
32 *and United States Constitutions?*

Issue 3: Did the Amendment impose an illegal tax ... *in violation of RCW 82.02.020 nd/or common law ...?*

Issue 4: Did the Amendment result in an *uncompensated taking ...?*

Issue 5: Did the City ... engage in ... *in violation of the United States Constitution?*

²⁷ April 1, 2009 Order on Dispositive Motion.

²⁸ Order on Dispositive Motion, at 2.

²⁹ Motion to Vacate at 4.

1 any evidence to demonstrate that the Board's assessment of the impact of the adoption of
2 the "Transportation 2025 Map" was in error. Instead of evidence, Petitioners merely
3 reference the *allegations* contained in paragraphs 6.3, 6.5 and 7.6 of the Petition for
4 Review.³⁰ In addition, Petitioners submitted material from a staff report which stated that:

5 "[T]his proposal is to only add the Ensign Road Extension to the
6 Comprehensive Transportation Map. The City does not have any project
7 planned. As private development occurs, the map designation would identify
8 the need for a street connection from Pacific Avenue to Martin Way and would
9 be constructed by the development."³¹

10 This staff comment, which is not part of the Comprehensive Plan itself, does not
11 demonstrate a violation of RCW 36.70A.020(6), but instead supports the Board's earlier
12 appraisal that Petitioners are challenging a possible, future, land use permitting decision
13 over which this Board does not have jurisdiction.³² The Comprehensive Plan amendment,
14 on its face, makes no requirement for the dedication of private property.

16 **Conclusion:** The Board finds and concludes that, with the exception of Issue 1, the
17 Petitioners' Issues as set forth in the Board's March 5, 2009 Prehearing Order do no assert
18 a violation of the GMA. With Issues 2, 3, 4, and 5, Petitioners specifically allege violations
19 of the U.S. or State Constitutions, RCW 82.02.020, or common law; the Board does not
20 have jurisdiction over such issues. With Issue 1, although the Petitioners did allege a
21 violation of RCW 36.70A.020(6), the Board reaffirms its holding set forth in the April 1, 2009
22 Order on Dispositive Motion and finds no error in the conclusions set forth in the Order
23 which warrant reversal of that decision.
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26 In this regard, Petitioners' request for the Board to reconsider and vacate its holding,
27 thereby allowing the case to proceed to the Hearing on the Merits, is DENIED.
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32 ³⁰ Petitioners' Motion, at 4-5.

³¹ Koler Declaration, Exhibit 4, attached to Motion to Vacate.

³² Order on Motions, at 2-3.

ORDER

Based on the foregoing, the Petitioners' Motion to Vacate the Board's Order on Dispositive Motion, which dismissed this appeal, is DENIED.

Entered this 23rd day of April 2009.

James McNamara, Board Member

William Roehl, Board Member

Nina Carter, Board Member

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